Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1231

LINDEN LUMBER DIVISION, SUMMER & CO.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

AND

TRUCK DRIVERS UNION LOCAL NO. 413, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO RESPONDENT UNION'S BRIEF IN OPPOSITION

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In the instant case the National Labor Relations Board unequivocally held that an employer "should not be found guilty of a violation of Section 8(a)(5) [of the National Labor Relations Act] solely on the basis of its refusal to accept evidence of majority status other than the results of a Board election." (Pet. App. C, p. A41) Equally unequivocally, the Court of Appeals held that "[t]he position adopted by the Board

is inconsistent with the Act and its orders must be reversed." Pet. App. A, p. A26. Notwithstanding these diametrically contrary positions, and the Board's own attack on the Court of Appeals' decision in its companion petition for certiorari in No. 73-1234,[1] the Union contends in opposition that (1) Supreme Court review is "premature" (Union Br., p. 3) inasmuch as the Appellate Court remanded this case to the Board for further consideration; and that, in any event, (2) the question presented is one which, rather than left undecided by this Court in *N. L. R. B.* v. *Gissel Packing Company*, 395 U. S. 575 (1969), was previously "foreclosed by Congress" in the Act itself. Union Br., p. 3.

Both of these contentions are erroneous and fail to in any way mitigate the need for this Court to address itself to the serious dislocation in national labor policy caused by the decision of the lower court.

1. The Board has properly refused to accept the Court of Appeals' remand. Remand would serve no useful purpose for the Board has carefully considered and articulated its views, and the lower court has squarely rejected them. This is not a case, therefore, where a remand is required "due to the Board's lack of articulated reasons" for its decision (*N. L. R. B.* v. *Metropolitan Life Insurance Co.*, 380 U. S. 438, 442 (1965)), nor one requiring remand because ". . . the Court of Appeals did not pass upon the merits of the Board's petition for enforcement" (*N. L. R. B.* v. *Raytheon Co.*, 398 U. S. 25, 29 (1970)), nor even, as the Union concedes (Union Br., p. 3), one raising questions other than "issues of law not calling for examination or appraisal of evidence" (*Kiefer-Stewart Co.* v. *Seagram and Sons*, 340 U. S. 211, 214 (1951)). Rather, the lower court simply remanded this case to the Board to

1. The Board's Petition is styled *"National Labor Relations Board* v. *Truck Drivers Union Local No. 413, and Textile Workers Union"*, No. 73-1234. Linden Lumber Division, Summer & Co., fully supports the Board's petition and respectfully prays that it be granted and that the subject petition be consolidated therewith.

proceed within a specific legal framework, the parameters of which are wholly unacceptable to the Board as indicated by its petition in No. 73-1234. Cf. *Food Store Employees* v. *N. L. R. B.*, 476 F. 2d 546 (D. C. Cir. 1973), *cert. granted*, Dec. 3, 1973, No. 73-370. Remand in these circumstances, it is submitted, would serve no purpose and only further delay resolution of this case in which, as the lower court itself observed, "[t]he time elapsed since the underlying events . . . is [already] more than six years." Pet. App. A, p. A8.

2. The Union's contention (Br., pp. 2-3) that "the petitions in these cases do not "present a question which was left open in [*N. L. R. B.*] v. *Gissel Packing Co.*" but, instead, only "a question which was foreclosed by Congress in enacting the 1947 amendments to the National Labor Relations Act" is specious. The Union's arguments (Br., pp. 4-9) are precisely the same as those which were urged, but expressly left undecided and placed "aside", in *Gissel*. 395 U. S. at 594-5. Moreover, as both Linden (Pet., pp. 8-10) and the Board (Pet., pp. 12-20) demonstrate in their petitions, the Union errs in its assertion that, as a result of the Taft-Hartley amendments to the Act, an employer who does not engage in election interference may still be required to bargain with a union claiming an authorization card majority. To the contrary, as *Gissel* recognized (395 U. S. at 600), "the policies reflected in [the amendments] . . . fully support the Board's present administration of the Act . . . an employer [who does not engage in contemporaneous unfair labor practices] can insist on a secret ballot election . . ." A card-based bargaining order is warranted only where either a fair election has been rendered impossible or where, as contemplated by *United Mine Workers* v. *Arkansas Oak Flooring*, 351 U. S. 62, 68-69 (1956), the employer has voluntarily "satisf[ied] itself as to the union's majority status."

CONCLUSION.

For the reasons stated above, as well as for the reasons set forth in the petition, it is respectfully prayed that the petition be granted for the subject case.

Respectfully submitted,

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